

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-213552

DATE: December 23, 1983

MATTER OF: Amalgamet, Inc.

DIGEST:

Bidder's certification that product offered is from a nondesignated country may be waived as minor informality where bidder under delivery terms of invitation for bids (IFB) provided binding commitment that it would deliver material mined in Rwanda, a designated country. Mistaken certification does not reserve bidder right to elect to provide material from nondesignated country.

Amalgamet, Inc. (Amalgamet), protests the award of contracts under invitation for bids (IFB) No. GS0083-DxxC-0005 issued by the General Services Administration (GSA), for the acquisition of tantalum pentoxide (tantalum) for the National Defense stockpile. Amalgamet contends that its bid should have been considered as offering a product originating from a designated country under the Trade Agreements Act of 1979, 19 U.S.C. § 2511, et seq. (the Act) and implementing regulations contained in 41 Code of Federal Regulations (C.F.R.) § 1-6.1 et seq. (1983). Amalgamet, as a bidder of tantalum originating from a designated country, would have been entitled to one of the awards to supply tantalum under the IFB award procedures.

We sustain the protest.

On October 27, 1983, Amalgamet filed a protest with our Office, and on November 29, 1983, Amalgamet filed for injunctive relief with the United States District Court for the District of Columbia under Civil Action No. 83-3516. On December 15, 1983, the court requested our opinion on Amalgamet's protest by December 23, 1983. Due to the court deadline, we are providing this opinion on the basis of the protester's initial submission and GSA's protest report without further development of the record.

The IFB schedule invited bids for five line items, each consisting of 61,050 pounds of tantalum; one item was set-aside for small business. The IFB required that bidders

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certify that the tantalum was or was not from a country designated by the President or the United States Trade Representative (USTR). The IFB delivery schedule requested that the bidder designate the country or countries where the bidder intended to mine the tantalum to be delivered under the contract. The IFB advised that, in accordance with the Act and 41 C.F.R § 1-6.1614 (1983), federal agencies currently were prohibited from purchasing products originating from a nondesignated foreign country. However, the IFB further stated that GSA had requested a waiver from this prohibition, and invited bids offering products from nondesignated countries. The IFB further stated that if a waiver was granted, purchases would be made from bids offering products from nondesignated countries in the event there were insufficient responsive bids offering products from designated countries. After bid opening, the USTR delegated GSA authority to waive the Act's prohibition against purchases from nondesignated countries. GSA evaluated the 13 bids received and determined that none of the bids offered a product originating from a designated country. GSA invoked the waiver and awarded contracts to the bidders offering products from nondesignated countries which had submitted the four lowest responsive bids, and one set-aside award. Amalgamet's bid was not in line for award since it was considered as an offer from a nondesignated country.

Amalgamet objects to the GSA determination that its bid was not an offer from a designated country and contends that its certification to supply material from a nondesignated country should have been waived as a minor informality/irregularity or constituted a clerical error/mistake requiring correction.

Under the delivery portion of the bid schedule, Amalgamet had completed the "Place of Performance" clause as follows: "Contractor shall deliver the tantalum mined in RWANDA. (country(s) of origin) (contractor to complete)." However, under the IFB certificate of eligible product clause, Amalgamet certified as follows:

"The offeror hereby certifies that each eligible product, as provided in 41 CFR 1-6.1601, which is delivered from this solicitation is () is not (X) from a country designated by the President or the U.S. Trade Representative pursuant to Section 301 of the Trade Agreements Act of 1979."

GSA concluded that the affirmative certification by Amalgamet that its product would come from a nondesignated country controlled and thus Amalgamet's bid should be treated as an offer of a nondesignated country's product notwithstanding its place of performance statement that it would deliver from Rwanda, a designated country listed at 41 C.F.R. § 1-6.1612 (1983). GSA asserts that, at best, Amalgamet submitted an ambiguous bid. We disagree with GSA.

In our view, Amalgamet made a binding offer to deliver tantalum from Rwanda under the place of performance provision. We find that the certification constitutes a minor clerical informality by Amalgamet.

Reading the bid in its entirety, we find the only reasonable interpretation is that Amalgamet intended to offer material from Rwanda, a designated country. Under the specific IFB schedule delivery terms and representations, Amalgamet bound itself to deliver tantalum from Rwanda. Under the Buy American certification, Amalgamet explicitly listed tantalum from Rwanda as an excluded end product. This supports the interpretation that Amalgamet offered to provide a product from Rwanda.

The clause requiring the bidder to certify that the product to be delivered in accordance with any contract resulting from the IFB is or is not from a designated country merely asks for confirmation of the status of the country of origin specified. The misdesignation in the certification does not alter Amalgamet's stated obligation to deliver tantalum from Rwanda, nor does it reserve the right to supply tantalum from a nondesignated country. The information regarding the precise status of Rwanda as a designated country was readily ascertainable by GSA from the implementing regulations which are a matter of public record contained in the C.F.R. Under these circumstances, we find the clerical error in miscertification should have been waived by GSA as a minor informality. 41 C.F.R. § 1-2.406.2 (1983). See also The R.H. Pines Corporation, B-205080, April 16, 1982, 82-1 CPD 351.

In this connection, while as GSA points out, 41 C.F.R. § 1-6.1609(a) provides, in part, that "contracting officers shall rely on certificates by the offeror for purposes of satisfying the Rule of Origin," we agree with the protester that this regulation does not require contracting officers to rely exclusively on the certification and reject other evidence in the overall bid document such as where a bidder has elsewhere in its bid committed itself to offer material

from a specified country. Here the certification added nothing to the bid and was in effect redundant. Timberland Paving and Construction Co., B-205179, June 21, 1982, 82-1 CPD 608; Government of the District of Columbia Request for Advanced Decision, B-182356, August 4, 1975, 75-2 CPD 77.

While GSA contends that Prestex, Inc., 59 Comp. Gen. 140 (1979), 79-2 CPD 411, should control in this regard, we find it inapposite. Prestex, supra, involved an allegedly erroneous certification by a small business that the bidder would not supply materials manufactured by small business concerns, under a small business set-aside. We held the certification could not be corrected after bid opening, and that the listing of small business firms under the place of performance clause did not remedy the allegedly erroneous certification. Here, however, the obligation to provide material from Rwanda is unequivocal, while in Prestex, supra, the bidder reserved the right because of its certification to have the contract work performed by large business under certain limited circumstances.

We recommend the protest be sustained. It is our understanding that performance has commenced. We would recommend that GSA investigate the feasibility of terminating the highest price contract award. If this is feasible, an award should be made to Amalgamet.

for *Harry R. Van Cleave*
Comptroller General
of the United States